IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

JOSE V. BACA, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Claims dismissing the petition therein as to four of the plaintiffs and holding four others entitled to recover on a limited basis.

OPINION BELOW

The opinion of the United States Court of Claims is not yet officially reported. The opinion of the Court, which adopts the opinion of its Commissioner, together with the dissenting opinion of Judge Madden, is printed in Appendix A hereto.

In accordance with the Rules of the United States Court of Claims, the trial was limited to the claims of nine of the twenty-four plaintiffs and to the question of liability, the amount of recovery being reserved for future proceedings as provided in Court of Claims Rule 38(c).

JURISDICTION

The judgment of the United States Court of Claims (Appendix A, *infra* p. 1a) was entered June 8, 1960. Plaintiffs' Motion for Rehearing filed on June 15, 1960 was denied by the Court without opinion on July 15, 1960. (Appendix B, *infra* p. 19a) The Court of Claims had jurisdiction under 28 U.S.C. § 1491 (1958 Ed.). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1) (1958 Ed.).

QUESTIONS PRESENTED

This case presents two questions.

1. Inasmuch as the Congress of the United States has provided that the regular hours of labor for Wage Board employees of the United States shall not exceed forty hours per week and that all overtime shall be compensated for at the rate of not less than time and one-half, may the Department of the Army assign civilian bus drivers the duty of transporting persons to a remote desert installation and then designate four hours at the remote installation as being an "off-duty" period and deduct these hours in computing the time for which the employees are compensated?

2. May the United States "suffer or permit" an employee who is paid for eight hours of work a day to perform similar work for an additional four hour period and refuse to compensate him for such services on the ground that they were performed voluntarily?

STATUTES INVOLVED

Section 23 of the Independent Offices Appropriation Act, 1935, referred to as the Wage Board Statute, 48 Stat. 522 (1934), 5 U.S.C. § 673(c) (1958 Ed.) provides:

> "The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: Provided, *That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one half.* * * *" (emphasis supplied)

33 Stat. 1257 (1905), as amended, 31 U.S.C. § 665(b) (1958 Ed.) provides:

> "No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property."

STATEMENT OF THE CASE

The plaintiffs in the Court below are twenty-four civilian Wage Board employees of the Department of the Army all of whom were bus drivers at the White Sands Missile Range during all or part of the period from October 1951 through October 1957. The factual basis for the case can be stated very simply. The White

Sands Missile Range (formerly known as the White Sands Proving Grounds) is a military installation in an isolated desert region an hour and a half's drive, under good conditions, from El Paso, Texas. It is similarly remote from the other surrounding communities. During the period covered by this litigation, the bus drivers transported civilian and military personnel to the White Sands Missile Range in the morning and returned their passengers to the various surrounding communities in the evening. To perform their daily tour of duty, the bus drivers were required to pick up their buses at approximately 6 o'clock in the morning and at the conclusion of the day's work to return the buses at approximately 6 o'clock at night to the same parking lot from which they had started twelve hours earlier. The dispute in this case concerns primarily four of the intervening eight hours in each day, either in the morning or afternoon, during which the drivers remained at White Sands, but were designated as being "off duty".

Petitioners' contention is that their jobs claimed their entire day from 6 o'clock in the morning when they picked up their buses to 6 o'clock at night at the conclusion of their return run in the evening. They contend that they worked twelve hours a day and the practice of the Department of the Army of paying them for only eight hours violated the Wage Board Statute. In other words, the designation of four hours at White Sands as off-duty time did not, either practically or legally, affect the duration of their daily employment.

The majority of the Court did not find that the employees were able to use this so-called off-duty time effectively for their own purposes. In summary, the

opinion concludes that if the geographic isolation of the post were not considered, the time could have been effectively used for the drivers' own purposes.

The principal facts found by the Court are as follows (Opinion, pp. 4a-7a):

White Sands is located in a desert region of southern New Mexico. The nearest sizable towns are Las Cruces and Alamogordo, New Mexico, and El Paso, Texas. The headquarters area at White Sands is approximately 28 miles northeast of Las Cruces, approximately 52 miles southwest of Alamogordo, and approximately 51 miles north of El Paso (over the most direct route).

The White Sands bus service was originally established in order to provide transportation 5 days per week (Monday through Friday) for civilian employees and military personnel who worked at White Sands but who lived in or near Las Cruces, Alamogordo, or El Paso. Morning bus runs from each of the three towns mentioned to White Sands, and afternoon bus runs from White Sands to the three towns, were established. The bus drivers lived in the various towns from which service to White Sands was provided.

Providing the bus service required that each bus driver, as a normal pattern of operation, work each regular workday for approximately 2 hours in the morning (from about 6 to 8 a.m.) in operating a bus from the town of his residence to White Sands and in performing other duties directly related to such operation, and to work for another period of approximately 2 hours in the afternoon (from about 4 to 6 p.m.) in operating a bus from White Sands to the town of his residence and in performing other duties directly related to such operation.

During the interval of approximatey 8 hours between 8 a.m. and 4 p.m., the bus drivers while at White Sands were from time to time required to perform other work not directly involving the transportation of passengers.

Sometime in 1952, an arrangement was made by the management at White Sands whereby approximately half of the bus drivers were considered as being on duty during the morning until 12 noon and off duty from 12 noon until 4 p.m., while the remainder of the drivers were considered as being off duty from 8 a.m. until 12 noon and on duty after 12 noon.

Each bus driver had a period of approximately 4 hours each workday, either in the morning or in the afternoon, when he was regarded by the management at White Sands as being off duty. This "off-duty" time intervened between periods of duty.

The bus drivers were paid on the basis of an 8-hour day and a 40-hour week for the services that are involved in this litigation. The 8 hours of daily working time for which a driver was compensated consisted of the 2 hours in the morning involved in operating a bus from the town of the bus driver's residence to White Sands (and related activities); the 2 hours in the afternoon involved in operating the bus from White Sands back to the town of the driver's residence (and related activities); and another 4-hour period of duty either in the morning or in the afternoon. No compensation was received for the "off-duty" time that intervened between periods of duty.

Because of White Sands' isolation, and the lack of any practicable means of leaving the post, the bus drivers generally spent their "off-duty" time at White

Sands, waiting for their subsequent duties to begin. During the greater part of the period involved in this suit, the drivers' waiting time was usually spent in or near their parked buses, but in 1956 a waiting room, with facilities for recreation, was provided for the drivers by the management at White Sands. The drivers went to a cafeteria on the post and to the post exchange whenever they wished to do so.

The Court in adopting the Commissioner's Findings of Fact concluded that the bus drivers' off duty periods were occasionally switched to meet the transportation requirements of the transportation section and that the drivers were on some occasions assigned to work during their off-duty periods although such occasions were found by the Court to be infrequent. Plaintiffs formally excepted to this Finding. (Plaintiffs' Exceptions to the Commissioner's Findings, filed December 15, 1959, pp. 37-39, 44). It is, however, conceded that during the periods of so-called off-duty time the plaintiff bus drivers were not only available for call but were on occasion actually ordered to perform various services. Nor is it disputed that the military bus master had authority to switch the bus drivers' designated off-duty periods at the last moment in order to have drivers for particular runs available when they were required. (Tr. 632-633).

In 1952 one of the petitioners, Vick V. Serna, and another bus driver were assigned to assist the bus master. Later Serna was designated section leader. The Court found that it was anticipated that one of the section leaders would assist the bus master in the preparation, issuance and logging of trip tickets, in typing duty rosters, in answering the telephone and in relaying instructions to the drivers during the four

hour period from 8 a.m. to 12 noon and that the other section leader would perform these services from 12 noon to 4 p.m. The Court found that Mr. Serna, with the knowledge and acquiescence of the bus master, frequently rendered assistance to the bus master during his so-called off-duty time. The Army officials at White Sands advised Mr. Serna when he took the job that he would not be compensated for work performed during the off-duty periods. Mr. Serna took the job as section leader, having been led to believe that he would receive a promotion in lieu of overtime pay. (Tr. 918; Plaintiff's Requested Finding 69).

The Court of Claims held, Judge Madden dissenting, that scheduled off duty periods of two hours and less constituted compensable hours of labor, that scheduled off duty periods of more than two hours did not constitute hours of labor, and that petitioner Serna voluntarily worked overtime and therefore could not claim overtime pay.

REASONS FOR GRANTING THE WRIT

This case presents two principal issues of general public importance. The first, which concerns government employees generally, certain employees of government contractors and the estimated twenty-four million Americans who work in occupations covered by the Fair Labor Standards Act,[1] raises the question whether four hours of designated off-duty time at a remote location, where the time cannot be used effectively for an employee's own purposes, are to be deducted in computing the duration of the employee's work day.

The second question applies to government employees only and concerns whether they can be required or

[1] United States Department of Labor, Annual Report 1959, p. 217

permitted to perform overtime work without compensation.

I.

The basic issue presented by this case is whether petitioners devoted a twelve-hour day to their employer, the Department of the Army, or whether the assigned off-duty periods at White Sands Missile Range are to be deducted in computing their hours of labor. The Wage Board Statute, 48 Stat. 522, 5 U.S.C. § 673(c) (1958 Ed.) provides:

> "* * * That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one half. * * *"

The Court of Claims held that when bus drivers were assigned off-duty periods of two hours or less, it would not have been possible for them to use this time effectively for their own purposes even if White Sands had not been located in an isolated desert region. Consequently, the Court concluded that this so-called off-duty time was necessarily spent in readiness to perform the next tour of duty and was therefore spent predominantly for the Government's benefit. (Opinion, pp. 13a-16a). However, with respect to the off-duty periods of more than 2 hours, including the four-hour break, the Court concluded that if the factor of geographic isolation were ignored, this time theoretically could have been used effectively for the drivers' own purposes and that "[t]heir election generally to remain at White Sands during the four-hour waiting periods was not predominantly for the benefit of the Government but, instead, was due to the isolation of the post in

a desert area and the inconvenience of going elsewhere." (Opinion, p. 8a).

This is in effect a holding as a matter of law that the factor of geographic isolation is not to be considered in determining whether the drivers could have used the time effectively for their own purposes and whether their forced presence at the desert location was predominantly for their own benefit or for that of the Government. As pointed out by Judge Madden in his dissenting opinion, this legal position forces the Court to ignore important practical considerations affecting the drivers' employment. As he indicated, the Court gave no weight to the following:

(1) the plaintiffs had uses for their time other than lying under buses in a parking lot to get out of the sun, going to a snack bar at White Sands, or similarly idling away their time at a remote desert installation;

(2) that it was impossible for the drivers to get off the post during their four-hour off-duty period since there was no available public transportation and they could not have the use of their own automobiles because they drove Army buses to the Missile Range;

(3) that the bus drivers had to be at White Sands in order to drive the other employees back to the surrounding communities at the conclusion of the working day;

(4) without their presence during the four-hour "off-duty" period there was no practical and economic way for the Army to have the buses driven in the morning and in the evening and on-post runs made during the day.

The Court of Claims has interpreted the leading cases in this field, *Armour & Co.* v. *Wantock*, 323 U.S.

126 (1944), and *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), as sanctioning a hard-and-fast rule that four hours of off-duty time, no matter where granted, are not to be counted as "hours of labor" since it is conclusively presumed that the employee involved could effectively use four hours for his own purposes (except for such factors as geographic isolation which may not be considered).

The Court's failure to consider geographic isolation is reflected not only in the distinction it makes between off-duty periods of more than two hours and shorter periods, but also in the Court's reliance on *Abbott* v. *United States*, 138 C. Cls. 449, 464 (1957). This case is relied upon by the Court to establish the proposition that

> "where an employee has complete freedom during a waiting period to go where he pleases and do what he pleases, so long as he is at the proper place when the time arrives for the beginning of his actual labor, the waiting time is not working time, and is not compensable." (Opinion, p. 8a).

The *Abbott* case, however, involved a claim by Panama Canal pilots that they were entitled to be paid for time spent in their own homes after being notified by telephone that they would have to go to work and that a car would call for them at a specified time. The Court of Claims concluded in the case presently before the Court that time spent sitting under a bus in the desert is to be considered no differently from time spent in the comfort of one's home while waiting to go to work.

In petitioners' view, there is nothing in the decisions of this Court which requires such a restricted interpretation of the hours which an employee devotes to his employer. The Court of Claims in its opinion

distinguished the cases upon which plaintiffs relied on the ground that those cases involved employees who, although sleeping, eating or otherwise amusing themselves, were held entitled to compensation because they were expressly required to remain on their employer's property. The bus drivers, the Court concludes, were not expressly required to remain at White Sands but did so merely because the Missile Range was in an isolated desert area and they had no transportation to enable them to go elsewhere. In terms of the holdings of this Court, this distinction is not a proper one. This Court has held that the determination of whether or not waiting time is work time is "dependent upon all circumstances of the case", *Armour & Co.* v. *Wantock*, *supra*, at p. 133, and involves consideration of such factors as "whether the time is spent predominantly for the employer's benefit", *ibid.*, "consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances", *Skidmore* v. *Swift & Co.*, *supra*, at p. 137. In such cases the Court must determine whether the time "even though pleasurably spent . . . was spent in the ways the men would have chosen had they been free to do so", *id.* at 139. The overriding consideration is that hours worked "'are not limited to the time spent in active labor but include time given by the employee to the employer'", *id.* at 138. This Court has not relied on technicalities. If formal orders to the bus drivers to remain at White Sands were technically withheld, that does not change the fact that the drivers were as much restricted as if such orders had been given. Furthermore, it was the Government which caused these drivers to be left in the middle of the desert without means of going elsewhere and also which required their presence for the return runs in the

evening and to drive regular and special runs on the post during the day. It is indeed a surprising state of affair that the provisions of the Wage Board Statute requiring time and a half compensation for all hours worked in any one day in excess of eight can be circumvented by merely withholding an unnecessary order.

The Court of Claims' holding that periods of off-duty time of from two to four hours are not compensable, no matter where they take place, affects not only Wage Board employee bus drivers for the Department of the Army and Wage Board employees generally but all persons whose working hours are governed by federal legislation. This group includes not only Civil Service employees compensated under the Federal Employees Pay Act of 1945, 59 Stat. 295 (1945), as amended, 5 U.S.C. §§ 901-958 (1958 Ed.), laborers and mechanics on public works subject to the Eight Hour Law, 27 Stat. 340 (1892), as amended, 40 U.S.C. § 321-326 (1958 Ed.), employees of contractors furnishing supplies to the United States subject to the Walsh-Healey Public Contracts Act, 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35 (1958 Ed.), employees of the Postal Field Service compensated under the Postal Field Service Compensation Act of 1955, 69 Stat. 88, as amended, 39 U.S.C. §§ 951-1038 (1958 Ed.), but also the estimated twenty-four million persons covered by the Fair Labor Standards Act, 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-219 (1958 Ed.). The reason for this is that the federal courts in determining what constitutes hours of labor

[1] Section 201, 5 U.S.C. § 911 (1958 Ed.), provides, with certain exceptions, that for civilian employees of the government, all hours worked "in excess of forty hours in any administrative work week" shall be considered overtime.

have relied on the two leading cases in this field, *Skidmore* v. *Swift*, *supra*, and *Armour* v. *Wantock*, *supra*, interchangeably in cases involving the determination of what constitutes hours of labor not only under the Fair Labor Standards Act but also under the Federal Employees Pay Act of 1945, as amended,[3] the Wage Board Statute, the Eight Hour Law, and other similar legislation. See e.g., *Armstrong et al.* v. *United States* (C. Cls. No. 145-56, decided Jan. 14, 1959); *Winsberg* v. *United States*, 120 C. Cls. 511, 517 (1951); *Gaetke* v. *United States*, 136 C. Cls. 756, 759-760 (1957).

The decision of the Court of Claims, if allowed to stand, clearly sanctions the practice of splitting shifts at a remote location with a curious and distressing caveat; and an employer seeking to take advantage

[3] It must be acknowledged that Federal employees covered by the Federal Employees Pay Act of 1945, as amended, are less likely to be adversely affected by the Court's decision than are the other classes of persons enumerated, since a 1954 amendment to the Pay Act precludes splitting working days by off-duty periods of more than one hour except where a determination is made by the designated official that to do so is required for the efficient operation of the service and that substantially increased costs would otherwise result. 5 U.S.C. § 944(2) (1958 Ed.). This statutory provision, which does not apply to Wage Board employees such as the plaintiffs, significantly limits the likelihood that Federal employees generally will have shifts split by a four-hour off-duty period. The legislation does not, however, deal with the question of whether a particular period designated as being "off-duty" must nevertheless be considered as compensable hours of labor under Section 201 of the Federal Employees Pay Act of 1945, 5 U.S.C. § 911 (1958 Ed.), which provides for overtime compensation for all hours of work in excess of forty in any week. The determination of whether designated off-duty periods nevertheless constitute hours of labor is "dependent on all the circumstances of the case, whether the time is spent predominantly for the employer's benefit and whether it embraces time given by the employee to the employer". In other words, this is the precise issue in this case.

of the Court's opinion would be well advised not to assign his employee an off-duty break of less than two hours, since the Court has held that breaks of that duration or less would be compensable. It would then be to his financial interest to assign breaks of more than two hours thereby converting the traditional concept of an eight-hour working day into a work day of from ten to thirteen hours. A change of this significance in the work patterns of countless persons should receive the most careful consideration of this Court.

The danger of such abuse is no matter of idle speculation as is revealed by the record in this case. Certain of the bus drivers at White Sands had particularly long morning and evening runs requiring them to start work half an hour earlier and stop work half an hour later than the other bus drivers. Working under the theory later adopted by the Court of Claims, the Army conceived of a plan to avoid the payment of any overtime which can only be characterized as vindictive. The Army did not take the position that these men were working a thirteen-hour day and should be paid for thirteen hours. It did not take the position that they worked one hour longer than the other drivers and should be paid for nine hours. Instead, the bus drivers with these long hours were granted the meaningless windfall of an extra hour of off-duty time at White Sands. If such conduct is permissible on the part of an employer, an eight-hour day has little meaning.

To employees covered by the Fair Labor Standards Act, the implications of the Court of Claims' decision are in some respects more serious than to the other classes of persons affected, since the decision creates a split between the Court of Claims and the Court of

Appeals for the Fourth Circuit on the question of what constitutes "hours of labor" for employees whose duty includes waiting time. This split is particularly significant in terms of the administration of the Fair Labor Standards Act because of the provisions of Section 16 of that Act, 29 U.S.C. §216(c) (1958 Ed.), which provides in part that the Secretary of Labor may bring an action on behalf of employees to recover wage claims only if settled issues of law are involved. The split between the Court of Claims and the Fourth Circuit raises precisely the type of uncertainty that could deprive the Secretary of Labor of jurisdiction in similar cases.

In connection with the administration of the Fair Labor Standards Act, the Department of Labor issues interpretative bulletins which have the function of informing the public of the position of the Administrator of the Wage and Hour and Public Contract Division with respect to the interpretation of the Act. He is of course bound by judicial interpretation of the Act. Interpretative Bulletin, *Hours Worked*, includes the following statements:

> "Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case." (29 C.F.R. 785.3(b)(2)(ii)
>
> * * *
>
> "*On-call time.* An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call.' An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call." (29 C.F.R. 785.3(b)(3)).

If the Court of Claims decision were taken into consideration changes would be required in the interpretative bulletin, to reflect the compensability of short breaks and that breaks of more than two hours, even at remote locations, are not compensable.

The position of the Fourth Circuit is set forth in the case of *Wright* v. *Carrigg*, 275 F. 2d 448 (4th Cir. 1960), reversing and remanding 174 F. Supp. 27 (E.D.S.C. 1959). The *Wright* case involved a driver who was employed to drive a truck over a route between certain South Carolina cities for the purpose of picking up and depositing mail at various railroad stations. Although the time he spent in driving amounted to four to four and one-half hours each day, he spent an additional three hours waiting for trains at certain locations. The employee was advised by his employer before taking the job that he would not be paid for the waiting time. Nevertheless, the Court classified these waiting periods as compensable hours of employment. It in part based its holding upon the consideration that the employee could not use the time effectively for his own purposes. Specifically, he could not secure other employment or find suitable sleeping accommodations. This aspect of the District Court opinion was specifically affirmed by the Court of Appeals for the Fourth Circuit when it stated:

> "The District Court held, correctly, that waiting time should be included in the hours for which the employee is entitled to be paid."

The Court of Claims on the other hand considers the duration of the break as the sole determinant.

This issue of what constitutes "hours of labor", therefore, should be clearly decided by this Court by virtue of the public importance involved and the conflict which the Court of Claims' decision creates with the holding of the Fourth Circuit in *Wright*.

II.

This case also presents the question of whether or not the United States may suffer or permit an employee to perform useful services and decline to compensate him on the ground that the services were voluntary. This is a particularly important question for government employees generally, since the statutory provisions pertaining to voluntary services differ from those applicable to employees covered by the Fair Labor Standards Act. The Court's opinion, if allowed to stand, would sanction the efforts of overly zealous government officials in forcing employees desiring advancement, or even the retention of their jobs, to perform "voluntary" overtime duty.

Petitioner Yick V. Serna, testified that he did not volunteer for the position of section leader but felt that he was directed to take it. Furthermore, he was told at the time he took the job that he would be working practically all day but would not receive overtime compensation. Instead, he was told he could look forward to a promotion. Two years later he received a meritorious increase raising his pay from $2.03 to $2.12 an hour. (Tr. 142, 918-919).

As a matter of law, overtime work performed under these circumstances should not be considered voluntary. Any Government employee, like Mr. Serna,

working overtime under similar circumstances is undoubtedly interested in receiving a promotion. A promotion is certainly a form of compensation, though not the one provided by Congress. If looked at realistically, the Army has sought to compensate an employee for overtime work, which the Court of Claims found was performed with its knowledge and acquiescence, not at the statutory rate of time and one-half but with a promise of a promotion at a future date.

On the other hand, if credence is to be given to the fiction that Mr. Serna was induced to perform these services on a truly voluntary basis, he should nevertheless be compensated at the statutory rate. To do otherwise would completely negate the requirement that voluntary services shall not be accepted for the United States, 33 Stat. 1257 (1905), as amended, 31 U.S.C. § 665(b) (1958 Ed.). This is a salutory provision. Perhaps some employees would agree to work on a voluntary basis but in most instances the possibility of their doing so would create an opportunity for administrative officials to force employees to work without compensation. The factual analysis required in each such case to determine whether or not the hours of labor were voluntarily contributed or were induced by other factors would put a significant and unnecessary burden on the courts and would place many government employees in an unfair position.

Under Section 3(g) of the Fair Labor Standards Act, 29 U.S.C. § 203(g) (1958 Ed.) compensable employment embraces any period of time during which an employer "suffers or permits" an employee to work. Consequently, if an employer covered by the Fair Labor Standards Act merely has knowledge that an employee is working, the time is compensable.

The Department of Labor Interpretative Bulletin *Hours Worked* contains the following provision:

> "(a) *Employees 'suffered or permitted' to work.* (1) Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time." (29 C.F.R. 785.3(a)).

There is, consequently, no advantage to an employer either to encourage or to require an employee to voluntarily work overtime, or even to close his eyes to what is going on. E.g., *Kappler* v. *Republic Pictures Corp.*, 59 F. Supp. 112, 116 (S.D. Iowa 1945), *aff'd*, 151 F.2d 543 (8th Cir. 1945). With respect to Federal employees Congress has provided that "no officer or employee of the United States shall accept voluntary service for the United States * * *" 33 Stat. 1257 (1905), as amended, 31 U.S.C. § 665 (b) (1958 Ed.). This provision has now been interpreted by the Court of Claims to mean that if voluntary services are accepted, contrary to the statutory requirement, compensating the employee involved is not necessary. The Court of Claims previously held in *Schaible* v. *United States*, 135 C. Cls. 890 (1956), that government employees could not be compelled by their superiors to accept compensation for overtime work at rates lower than that specified by law. In this connection the Court explained its reasoning in the following language:

> "The clear weight of authority and the better reasoning favor the view that full statutory compensation of public employees is mandatory, on grounds of public policy. Any suggestion of barter and trade in public employment is thereby eliminated. In order to make certain of this result, protection is afforded against the pardonable, and even commendable zeal of administrative officials in the application of statutory standards through regulations, if as a matter of law their sights were too low." (135 C. Cls. at 898).

Subsequently, in *Anderson* v. *United States*, 136 C. Cls. 365 (1956), the Court of Claims held with respect to overtime services performed by customs inspectors that, contrary to the contention of the Government, these services were not really voluntary since the inspectors were "induced" by their superiors to perform them. The Court also based its holding on an alternate ground which it stated as follows:

> "If, under the facts, the services could be said to have been performed voluntarily within the full meaning of the word, the decision in *Farley*, *supra*, is authority for the services being compensable notwithstanding. The analysis in *Handly*, *Schaible*, and *Sanderson* cases, filed January 16, 1956, is to the same effect." (136 C. Cls. at 369).

In the present case, the Court has departed from *Anderson* and *Schaible*, *supra*, and returned to an 1890 holding in *Goode* v. *United States*, 25 C. Cls. 261, 267 (1890), which stood for the proposition that if an employee performs services without objection and upon the implied condition that he is not to charge for his services, he is estopped from later demanding compensation. (Opinion, p. 18a). This is a harsh doctrine and will lead to harsh results in this and many

other cases. Nor should *Goode* now be considered a precedent of any value since it was decided 15 years before Congress prohibited the acceptance of voluntary services.[4]

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[4] Even ignoring the 1905 statute the Court of Claims in relying on the *Goode* case has gone far beyond anything that *Goode* was ever intended to hold. The *Goode* case involved a government employee who signed aboard a government ship as a paymaster's yeoman and performed the duties of a recorder in the United States Coast and Geodetic Survey. In his suit filed in the Court of Claims he later sought additional compensation for the services he had performed as a member of the Survey. The Court held that he was not entitled to receive compensation for two jobs at the same time and that while holding the position of paymaster's yeoman he could agree to perform the duties for the Survey. *Goode* was one of a line of cases, principally *Converse* v. *United States*, 62 U.S. (21 How.) 463 (1859); *United States* v. *Brindle*, 110 U.S. 688 (1884); *United States* v. *Saunders*, 120 U.S. 126 (1887); *Glavey* v. *United States*, 35 C. Cls. 242, 253-256 (1900), which turned on Rev. Stat. § 1765, 5 Stat. 349 (1839), which provided that government office holders or employees being paid for one position could not receive compensation for discharging the duties of any other office or appointment unless expressly authorized by law. The holding of these cases and the proper interpretation of these statutes was summarized in *United States* v. *Saunders*, 120 U.S. 126 (1887) where the Court stated:

> "... We are of opinion that, taking these sections all together, the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by act of congress or by order of the head of his department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case he is, in the eye of the law two officers, or holds

The decision of the Court that a government employee may not be compensated for voluntary services performed with the knowledge and acquiescence of his superiors touches in a profound way every man and woman who works for the United States. It puts government employees at the mercy of zealous superiors who may control their opportunity for advancement by whether or not they voluntarily agree to perform as many as four hours of overtime service a day. If this question is not speedily and directly resolved, government disbursing officers will at their peril pay salary and wage claims which the Court of Claims previously indicated were perfectly proper.

Petitioners believe that so-called voluntary services of the type performed here should properly be held to be compensable. However, this matter is of such extreme importance that whichever way it is to be decided, a clear and unequivocal pronouncement by this Court is required.

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two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is in such case entitled to receive the two compensations. In the former case he performs the added duties under his appointment to a single place, and the statute has provided that he shall receive no additional compensation for that class of duties, unless it is so provided by special legislation. . . ."

It Goode had been successful in his suit, he would have been paid two salaries at the same time. That case does not form a basis for denying petitioner Serna, an employee paid by the hour, compensation for time during which he would not otherwise receive any compensation. No element of double compensation is involved in Serna's case. There are two alternatives: either Mr. Serna gets paid at the statutory rate or he gets paid nothing for his overtime work.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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